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No. 95-266

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,

Petitioner,

v.

MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

The parties disagree about how the federal courts should balance a litigant's need for relevant evidence with an opponent's interest in confidential counseling with a social worker. Petitioner urges that these privacy interests can be fully protected through the district court's power "to exercise appropriate control over the discovery process." *Herbert v. Lando,* 441 U.S. 153, 177 (1979). Respondents disagree and ask the Court to fashion a broad testimonial privilege that would shield from disclosure at trial any impact the counseling process had on the party's ability to recall a particular incident.

Respondents are joined by distinguished amici in their plea for a broad privilege. In their efforts to assist the Court, however, amici have misread the record in several important aspects. One misunderstanding is about respondent Redmond's affirmative representation at trial that her memory of the incident was better after fifty counseling sessions than it had been immediately after the event.[1] A second misunderstanding of the record is to equate the counseling that respondent Redmond received with classic psychoanalysis. Another misunderstanding is about the manner in which respondent

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1. Petitioner is accused by respondents of misreading the record about the improvement in respondent Redmond's memory during therapy. (Resp.Br. 37.) The trial record contains the following questions and answers of respondent Redmond (App. 141-42):

> THE COURT: Now, Ms. Redmond, you are being asked whether your memory today is better than it was a few hours after the incident on how you were holding the gun.
>
> THE WITNESS: Then it would be yes.
>
> PETITIONER'S COUNSEL: It's better today?
> A. As far as how I held the gun.

The record also contains the following questions and answers of social worker Karen Beyer (App. 113):

> PETITIONER'S COUNSEL: Well, did you ever write down that she told you that she could not remember pulling the trigger?
> * * *
> BEYER: Yes. At one point in time she did say that to me. She was concerned about details like that.
>
> Q. Okay. And was she able to recall details of the incident when [she] spoke with you in those 50 sessions?
> A. Yes. And she even later recalled pulling the trigger.

In our view, these questions and answers fully support our contention that respondent Redmond's ability to recall and recount the incident improved during counseling.

Redmond sought to preserve her privilege. Rather than politely and firmly informing the district court that she was persisting in her invocation of a privilege, respondent Redmond claimed an inability to recall any of her conversations with the social worker. If this inability to recall was genuine, the jury was entitled to be informed of Redmond's memory problem. If, however, Redmond feigned an inability to recall, it can hardly be said that she was "careful to preserve the privilege." (Brief of Amicus Curiae United States at 7.)

Amici are also confused about the district court's orders permitting inquiries about the counseling sessions. The district judge never ordered "unrestricted and unlimited inquiry" into respondent Redmond's communications with the social worker. (Brief Amicus Curiae of the ACLU at 4.) The trial judge permitted petitioner to make a "narrow inquiry" into communications limited to recollections of the episode (Pet.App. 36) and required that respondent Redmond's deposition be supervised by a magistrate judge. (Pet.App. 38-39.) The district judge ordered production of the social worker's notes after finding that respondent Redmond had been untruthful in claiming an inability to recall what she had told the counselor about the episode. (Pet.App. 57.)

The United States, as amicus curiae, suggests that the Court adopt a federal evidentiary privilege the scope of which would be delimited by the privilege recognized by the state in which the counseling took place. (Brief of the United States 28.) Such a federal privilege would be difficult to administer because state law is a moving target: state legislatures frequently add exceptions to state privilege statutes and state appellate courts have not been hesitant to create exceptions to broad statutory privileges. Moreover, tying a federal privilege to state law would lead to anomalous results — a person who obtains counseling in Maryland would be entitled to a federal privilege, but there would be no privilege if the counseling took place in Virginia. In addition, the government's approach would require reversal in this case

under a recent amendment to the Illinois privilege statute.

Other distinguished amici ask the Court to approve a broad privilege that would cover psychoanalysis,[2] psychotherapy,[3] clinical social workers,[4] counselors,[5] and would be especially applicable to police officers.[6] Although we sympathize with police officers who are improperly accused of wrongdoing, the qualified immunity doctrine provides police officers with ample protection. Police officers should not be afforded complete confidentiality in counseling. Rather, consistent with the Court's approval of urinalysis testing in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989), and as reflected in the Employee Assistance Program regulations of the Drug Enforcement Administration, individual privacy rights must give way to society's need to protect itself from persons who should not have a police officer's authority to use deadly force.

As in *Upjohn v. United States*, 449 U.S. 383, 396 (1981), the Court should decline "to draft a set of rules" and instead rely on case-by-case balancing by district court judges. While case-by-case balancing "may to some slight extent undermine desirable certainty," such balancing "obeys the spirit of the

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2. Brief Amicus Curiae of George R. Caesar, M.D. et al. at 20-21.

3. Brief Amicus Curiae of the American Psychiatric Association at 3; Brief Amicus Curiae of the American Psychological Association at 21;

4. Brief Amicus Curiae of the NASW et al. at 4.

5. Brief Amicus Curiae of the ACLU Br. 20; Brief Amicus Curiae of National Network to End Domestic Violence at 21-22; Brief Amicus Curiae of American Counseling Association at 25-26; Brief Amicus Curiae of Menninger Foundation at 27-28.

6. Brief Amicus Curiae of the National Association of Police Organizations at 17; Brief Amicus Curiae of the International Union of Police Associations at 13.

Rules [of Evidence]." *Id.* at 396. Federal statutes governing disclosure of alcoholic treatment records provide an appropriate model for case-by-case balancing.

Respondents concede that the balancing of competing interests in this case was performed in the first instance by the Court of Appeals (Resp.Br. 12, 30, 35), but argue that the court below was correct in its factual determinations. (Resp.Br. 35-36.) Respondents also argue that credibility is not relevant to the "objective reasonableness" test of *Graham v. Connor* 490 U.S. 386 (1989). (Resp.Br. 36.) The Court, however, explicitly recognized in *Graham*, that credibility may be relevant to "objective reasonableness," *id.* at 399 n.12. This is especially true in this case, where the officer and family members of the deceased were the only witnesses to the officer's use of fatal force.

I. The Record Fails to Show that Respondent Received "Psychoanalytic Psychotherapy"

The record fails to support the contention that this case involves "confidential communications" made "for the purposes of psychotherapeutic treatment." (Brief of Amicus Curiae United States at I.) Nor does the record support the argument that respondent Redmond was receiving "psychoanalytic psychotherapy."[7]

Respondent Redmond began counseling at the suggestion of Karen Beyer "to use the employee wellness program." (Beyer Dep. 22, Jan. 26, 1993.)[8] The employee wellness program provides a variety of services, including medical

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7. Brief of Amicus Curiae American Psychoanalytic Association at 7 n.4.

8. This deposition was filed under seal as Record Item No. 111.

screening, psychological counseling and testing, and financial counseling.[9] Beyer, an employee of respondent Hoffman Estates, extended the invitation because Redmond "had been involved in a critical incident." *Id.*

In her motion to quash the subpoena to Beyer, respondent Redmond asserted that she had "received counseling from Karen Beyer."[10] (App. 16.) Respondent supported her motion with an affidavit from Beyer stating that all of her conversations with respondent had "been in my professional capacity as a licensed clinical social worker and certified employee assistance counselor and have pertained to my provision of counseling and counseling services to Ms. Redmond." (App. 18.) The motion to quash did not contain any further description of the counseling and did not set out any assertion that the communications were "necessary for treatment."[11]

The social worker was described for the first time as a "psychotherapist" in her motion to reconsider the district court's order refusing to quash the subpoena. (App. 36.) At no time, however, did the social worker identify the particular type of therapy she administered. (Beyer Dep. 60, July 13, 1992.)[12]

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9. A description of the services provided by the program appears as Exhibit "A" to Record Item No. 81.

10. Respondent repeated this description in the memorandum she filed in support of her motion, referring to Beyer as "a professional" to whom Redmond had "reasonably turned to obtain counseling following a difficult episode in her professional life." (App. 27.)

11. This omission is at odds with respondents' present position that a privilege should only apply to communications that were "necessary for treatment." (Resp.Br. 10.)

12. This deposition is an exhibit to Record Item No. 91.

The social worker's descriptions of the counseling sessions suggest that Beyer was working as a "social therapist," rather than as a psychotherapist.[13] At their first counseling session, Beyer talked about the shooting and about how Redmond was coping. (Beyer Dep. 23, Jan. 26, 1993.) At the second session, the two discussed problems that Redmond was having sleeping, concentrating, and eating and may have discussed relationship problems that were ongoing at the time of the shooting. (*Id.* at 23-24.)

At some point in counseling, the social worker listened to a tape recording of Redmond's police radio dispatches from the incident (Beyer Dep. 23-24, Jan. 26, 1993) and "may have" reviewed police reports about the shooting. (*Id.* at 20.) The social worker explained that she sought this information "in order to enhance my relationship with the client."[14] (*Id.* at 32.)

The counseling that respondent received can be fairly described as "reality interventionist,"[15] which is more akin to counseling rather than to psychotherapy.[16] Either form of

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13. As described in Bollas & Sunderson, *The New Informants* (1996), the social therapist "would not only discuss the client's feelings but would also explore, initiate, support and carry out practical actions that would help resolve the problem." *Id.* at 159. A psychoanalyst, however, would remain silent and listen to the client's free associations of "unconscious ideas, memories, and feelings that contribute to his mental suffering." *Id.* at 61.

14. This willingness to depart from "psychic reality" distinguishes the social worker's counseling from the psychoanalyst's therapy. The contention of the National Association of Social Workers (Brief Amicus Curiae NASW at 10) that social workers provide the "same" psychotherapy services as psychiatrists and clinical psychologists is somewhat overstated.

15. Bollas & Sunderson, *The New Informants*, 64 (1996).

16. "Counseling may be more involved with situational distress, while psychotherapy deals with personality reorganization." Shilling, *Perspectives on Counseling Theories* 2 (1984).

intervention can, as amicus NASW acknowledges, affect "subsequent recall of events."[17]

The impact of therapy on ability to recall is illustrated in *Wescott v. Crinklaw*, 68 F.3d 1073 (8th Cir. 1995). There, immediately after using deadly force, a police officer stated that the deceased had not turned in a menacing manner and that he "did not know" if the deceased had a gun in his hand. *Id.* at 1075. After therapy, the officer's recollections of the incident changed; the officer testified at trial that at the time of the shooting, he believed that his life was in danger.[18] *Id.* at 1080.

One mechanism that explains the change in perceptions that occur during therapy is known as "behavioral confirmation," which is "the essence of the self-fulfilling prophecy," Copeland, *Prophecies of Power: Motivational Implications of Social Power for Behavioral Confirmation*, 67 J. Personality and Social Psychology 264 (1994), and is quite different from inducing a false memory.[19] "Behavioral

17. Brief Amicus Curiae NASW at 26 n.40.

18. Prompt post-incident debriefing may well minimize post-traumatic stress symptoms. Brief of Amicus Curiae Int'l Union of Police Assoc. 12. *Wescott*, however, illustrates the potential impact of debriefing on the integrity of the fact-finding process.

19. The American Psychiatric Association overlooks this distinction in its amicus submission (at 26). Similarly, the American Association of State Social Work Boards (Amicus Br. 11) mistakenly asserts that our reference to the behavioral confirmation research means that we are "malign[ing] social workers as therapists." We are not seeking to malign any school of counseling or therapy. The existence of behavioral confirmation has been extensively documented. *See* Jones, *Interpreting Interpersonal Behavior: The Effects of Expectancies*, 234 Science 41, 43 (1986). Our position is simply that psychotherapy and counseling include "the use of suggestion, persuasion, reeducation, reassurance, and support." Brief Amicus Curiae of American Counseling Association 24 n.11, quoting *Dorland's Illustrated Medical Dictionary* 1284 (25th ed 1974).

confirmation" occurs "when clients actually come to behave in ways consistent with therapists' erroneous impressions."[20] "[I]nteractions between therapists and clients may be particularly conducive to behavioral confirmation processes."[21]

By listening to the police communication tapes, the social worker was departing from the "psychic reality" of "[f]ull disclosure in the psychotherapeutic context."[22] The social worker's interest in the communication tapes is inconsistent with attempting to "uncover[] the emotional effects" of the incident.[23] The record in this case does not provide any reason to believe that counseling exposed respondent Redmond's "most intimate thoughts, feelings, and fantasies,"[24] or brought "to light information about the unconscious that even the patients themselves were not aware of prior to the treatment."[25] On the contrary, respondent Redmond appears to have received counseling similar to that contemplated by the Bureau of Alcohol, Tobacco and Firearms in its Employee Assistance Regulations.[26]

20. Copeland & Snyder, *When Counselors Confirm: A Functional Analysis*, 21 Pers. and Social Psych. Bull. 1210 (1995).

21. Snyder & Thompson, *Interactions between Therapists and Clients: Hypothesis Testing and Behavioral Confirmation*, in Turk & Salovey (eds), *Reasoning, Inference and Judgment in Clinical Psychology* (1988), 146

22. "Full disclosure in the psychotherapeutic context. . . is not a process concerned with identifying and establishing objective facts but rather a technique designed to explore the patient's inner perceptions, concerns and difficulties." Brief Amicus Curiae of American Psychoanalytic Association at 22-23.

23. Brief Amicus Curiae of NASW 27.

24. Brief Amicus Curiae of American Psychological Association at 13.

25. Brief Amicus Curiae of American Psychoanalytic Association at 26. (emphasis omitted)

26. ATF Order O 2900.1A, *ATF Employee Counseling Program*, (September 14, 1988) provides as follows (par. 6):

Counseling, as referred to in this order, is not what is traditionally

Statements made in the course of "full disclosure in the psychotherapeutic context" may well have less relevancy than statements made by a person who is being counseled by a "social therapist." This distinction supports the exclusion of social workers and other counselors from the psychotherapist-client privilege of Proposed Rule of Evidence 504. The determination of whether statements made to a therapist or counselor are relevant should be made in the first instance by the district judge and should not be a part of any new privilege.

II. Respondent Sought to Preserve the Asserted Privilege by Feigning an Inability to Recall

The United States is mistaken in asserting that respondent Redmond was "careful to preserve the privilege." (Brief of Amicus Curiae United States at 7.)

The accepted and ordinary way to preserve a privilege is to "refuse compliance, be held in contempt, and then appeal the contempt order." *Church of Scientology of California v. United States,* 506 U.S. 9, 15 n.11 (1992). In this case, the district court offered to follow the procedure approved by the Seventh Circuit in *Memorial Hospital v. Shadur,* 664 F.2d 1058 (7th Cir. 1981), and impose a mild contempt sanction "for purposes of creating an issue that could then be carried

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thought of as an in-depth program of treatment. Rather, it is a process whereby a trained counselor seeks to identify a problem and, if warranted, provides short-term services to help the employee overcome the problem. Where short-term problem resolution is not appropriate, the counselor will direct the employee to sources of treatment and rehabilitation best suited to the employee's individual needs.

A copy of this order will be lodged with the Clerk of the Court.

on up." (Pet.App. 44.) Respondent, though, rejected this invitation to seek appellate review. Instead, when ordered by the district court to answer questions about what she had told her counselor about the facts of the incident, respondent Redmond asserted an inability to recall. (App. 102-07.)

The path that respondent Redmond chose is similar to that condemned by the Court in *Walder v. United States,* 347 U.S. 62, 65 (1954), where the defendant argued for the right to present "perjurious testimony in reliance on the Government's disability to challenge his credibility."[27]

If respondent Redmond was being truthful in her inability to recall, the jury properly considered her memory problem in evaluating Redmond's credibility. It is correct, as respondent argues (Resp.Br. 36), that plaintiff's Fourth Amendment claim turns on the "objective reasonableness" test of *Graham v. Connor* 490 U.S. 386 (1989). But to determine the facts that confronted the officer, the finder of fact is required to assess "the credibility of an officer's account of the circumstances that prompted the use of force." Id. at 399 n.12. This credibility determination requires an evaluation of the officer's ability at trial to recall and recount the "objective facts of the incident," which must be "filtered through the lens of the officer's perceptions at the time of the incident in question." *Rowland v. Perry,* 41 F.3d 167 (4th Cir. 1994).

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27. Following *Walder,* the Court has consistently refused to permit criminal defendants to misuse exclusionary rules, holding that voluntary statements taken in violation of *Miranda* warnings, as well as illegally obtained evidence, may be used to impeach. *Harris v. New York,* 401 U.S. 222 (1971) (oral statements); *Oregon v. Haas,* 420 U.S. 714 (1975) (same); *United States v. Havens,* 446 U.S. 620, 626 (1980) (illegally seized evidence).

Respondent Redmond's inability to recall — whether due to a genuine failure of memory or, as the district judge found (Pet.App. 52), feigned as a tactic to flout the district court's rejection of her asserted privilege — requires that the decision of the Seventh Circuit be reversed even if the Court adopts the broad privilege fashioned by the Court of Appeals.

III. The District Court Ordered Production of Counseling Records only after Finding that Respondent Redmond Was Feigning an Inability to Recall

Amici are confused about the nature and scope of the district court's orders requiring testimony by respondent and the social worker and directing production of the social worker's notes.[28]

The trial judge permitted petitioner to make a "narrow inquiry" into communications limited to recollections of the episode (Pet.App. 36) and required that the deposition be supervised by a magistrate judge. (Pet.App. 38-39.) The district court barred inquiry into any area beyond statements about the shooting. (Pet.App. 47-47.) Contrary to the suggestion of amicus American Psychiatric Association (Br. 22), the district court's ruling protected all other statements made in the course of counseling.

The district judge ordered production of the social worker's notes "which relate to the subject matter" of the incident after finding that respondent Redmond had been

28. Amicus ACLU mistakenly asserts that the trial judge ordered "unrestricted and unlimited inquiry." (Brief Amicus Curiae ACLU at 4.) Amicus American Psychiatric Association incorrectly contends that the district court's ruling "would justify examination of the whole psychotherapist-patient interaction." (Brief Amicus Curiae Amer. Psychiatric Assoc. at 17.)

untruthful in claiming an inability to recall what she had told the counselor about the episode. (Pet.App. 57.) Based on three pages of heavily redacted notes that the social worker produced in response to the district court's order, petitioner demonstrated that respondent had been untruthful at her deposition. (App. 70-72). Then, and only then, did the trial judge order the social worker to produce her unredacted notes for inspection "for counsel's eyes only." (App. 73.) The social worker, who was then a full time employee of respondent Hoffman Estates, refused to comply with this order. The disobedience of both respondents — rather than respondent Redmond's assertion of a privilege — was the basis for the district court's instruction about the counseling records.

IV. State Statutes Provide a Poor Model for a Judicially Created Federal Privilege

The United States, as amicus curiae, suggests that the scope of a federal psychotherapist-client privilege should be determined by the law of the state in which the communication occurred. (Brief Amicus Curiae of the United States at 28.) This argument, if accepted, requires reversal of the Court of Appeals because the Illinois privilege statute — as construed by the Illinois courts and as recently amended — does not provide respondent Redmond with a guarantee of confidentiality.

As recently amended,[29] the Illinois privilege statute permits a social worker "to communicate at any time and in any fashion with his present or former employer . . . concerning any care or treatment he or she provided, or assisted in

29. The amendment became effective on March 9, 1995, and applies to all actions filed "on or after its effective date." Public Act 89-7 (March 9, 1995).

providing, to any patient within the scope of his or her employment."[30] This provision permits the employee assistance counselor to inform his (or her) employer about the airline pilot who has a drinking problem, the jail guard who has a drug problem,[31] or the police officer who has a self-control problem.[32]

In addition to the statutory exception, the Illinois courts have construed the state therapist statute to permit a trial court's *in camera* review of a witness's therapy records.[33]

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30. Ill. Compiled Stat. Ann. ch. 740, §110/10(3.2) (1995) provides as follows:

> A therapist has the right to communicate at any time and in any fashion with his present or former employer, principal, partner, professional corporation, or professional liability insurance carrier, or counsel for any of those entities, concerning any care or treatment he or she provided, or assisted in providing, to any patient within the scope of his or her employment, affiliation, or other agency with the employer, principal, partner, or professional corporation.

31. *Cf. Moreland v. Department of Corrections,* 166 Ill.App.3d 1040, 520 N.E.2d 1227 (1988) (upholding discharge of nurse employed at prison who informed her supervisor that she was taking a leave to enter a drug treatment program).

32. The Illinois limitation on confidentiality is consistent with federal regulations applicable to workers at some nuclear power plants. 10 C.F.R. §26.25 (1995) provides, in pertinent part, as follows:

> The employee assistance program staff shall inform licensee management when a determination has been made that any individual's condition constitutes a hazard to himself or herself or others (including those who have self-referred).

33. To date, this rule has only been applied in criminal cases. *See, e.g., People v. Phipps,* 98 Ill.App.3d 413, 424 N.E.2d 727 (1981). *People v. Monk,* 174 Ill.App.3d 528, 528 N.E.2d 1063 (1988); *People v. Printy,* 232 Ill.App.3d 735, 598 N.E.2d 346 (1992); *People v. McMillan,* 239 Ill.App.3d 467, 607 N.E.2d 659 (1993).

People v. Bean 137 Ill.2d 65 560 N.E.2d 258 (1990). In the view of the Illinois Supreme Court, such *in camera* inspection does not unreasonably encroach on "the individual recipient's interest in maintaining the secrecy of this personal information." 137 Ill.2d at 100, 560 N.E.2d at 274.

The Illinois Supreme Court is not alone in creating exceptions to broad statutory privileges. Several other states have reached similar holdings approving *in camera* review of documents protected by a statutory counseling privilege.[34]

In addition to requiring the lower federal courts to make predictions about how state law would be construed by the state courts, the government's suggestion that a federal privilege be tied to state law is inconsistent with the express language of Rule 501, which requires a uniform privilege for all federal claims. Moreover, relying on state law for a federal privilege would lead to anomalous results. Maryland has a broad psychotherapist-client privilege. Md. Code. Ann. Cts. & Jud. Proc. §9-109 (1989 & Supp. 1993). The Virginia privilege, though, is subject to case-by-case balancing by the trial judge. Va. Code Ann. §8.01-400.2 (Michie 1992). Thus, under the government's proposal, a person who obtains counseling in Maryland would be entitled to a federal privilege, but there would be no privilege if the counseling took place in Virginia. This type of geographical variation (which, of course, is not limited to Maryland and Virginia) has no place in a federal rule. The extent to which a person may enforce a federal statutory remedy should not be determined by a

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34. *See, e.g., Commonwealth v. Two Juveniles,* 397 Mass 261, 491 N.E.2d 234 (1986); *People v. Stanaway,* 446 Mich. 643, 521 N.W.2d 557 (1994); *State v. Gagne,* 136 N.H. 101, 612 A.2d 899 (1992); *State v. Ramos,* 115 N.M. 718, 858 P.2d 94 (1993); *People v. Arnold,* 177 A.D.2d 633, 576 N.Y.S.2d 339 (1991); *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn. 1992).

state legislature. The government's suggestion that the scope of a federal counseling privilege be delimited by state law should be rejected.

V. An Individual Police Officer's Interest in Confidentiality Is Outweighed by Society's Interest in Identifying Impaired Individuals and Compensating Their Victims

Respondents argue that because of their position police officers should be encouraged through a broad privilege "to seek qualified professional help." (Resp.Br. 18-26.) But it is precisely because of their position that police officers should not be afforded absolute confidentiality in counseling.

Police officers are authorized to carry firearms, are required to make arrests, and are entrusted with the power to use lethal force. Most states shield police officers from civil liability for mere negligence; in Illinois, for example, a civil action against a police officer generally requires proof of "willful and wanton" misconduct.[35] Police officers also have a broad immunity from suit under 42 U.S.C. §1983 unless their conduct was unreasonable in light of clearly established law. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Davis v. Scherer,* 468 U.S. 183 (1984); *Elder v. Holloway,* 114 S.Ct. 1019 (1994). Granting police officers a further immunity through a counseling privilege would be the same type of "double counting," *Calder v. Jones,* 465 U.S. 783, 796 (1984), that the Court has consistently rejected. *See, e.g., Herbert v. Lando,* 441 U.S. 153 (1979) (no First Amendment privilege to bar inquiry into editorial process).

The Court has recognized that persons "who may use deadly force plainly 'discharge duties fraught with such risks

35. *Fitzpatrick v. City of Chicago,* 112 Ill.2d 211, 492 N.E.2d 1292 (1986).

of injury to others that even a momentary lapse of attention can have disastrous consequences.'" *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 670 (1989), quoting *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 628 (1989). As with drug screening, "the public should not bear the risk that employees who may suffer from impaired perceptions and judgment" will be permitted to continue to discharge their sensitive duties because of a broad counseling privilege.

That confidentiality must yield to public safety is reflected in the Employee Assistance Regulations of the Drug Enforcement Administration. These regulations make plain that there is no confidentiality when the counselor learns that the employee is unable to perform his (or her) duties safely and reasonably.[36]

Respondents' argument that confidentiality is the *sine qua non* of counseling (Resp.Br. 22-23) cannot be demonstrated by empirical evidence. It is noteworthy that Professor Shuman, a recognized authority in this area, admits that the empirical evidence to support a privilege is not compelling. (Brief Amicus Curiae ACLU at 17 n.15.) Nonetheless, Professor Shuman argues that a privilege should be recognized "because of its impact on the right to privacy." *Id.*

This Court has consistently required more than sincerely held beliefs as the predicate for a new privilege. For

36. The DEA regulations foreclose any privilege for statements about "criminal behavior," and mandate disclosure when "an employee's problem has been determined to pose a substantial risk or threat to his or her health or well being, or that of co-workers, family members, or the public." DEA Personnel Manual, March 27, 1992, Section 2794.47-4(B). (A copy of the relevant sections of the manual will be lodged with the Clerk of the Court.)

example, in *Branzburg v. Hayes,* 408 U.S. 665 (1972), the Court declined to create a new privilege because it was "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." *Id.* at 693.

Respondents' demand for confidentiality must be balanced against society's need to protect itself from persons who should not have a police officer's authority to use deadly force. The broad right to privacy urged by respondents would have protected from disclosure the threats made against an administrative law judge in *United States v. Snelenberger,* 24 F.3d 799 (6th Cir. 1994),[37] and the threats against the life of a federal district judge in *Viviano v. Moan,* 645 So.2d 1301 (La. Court of Appeals 1994).

A far better approach than the creation of a new privilege is to rely on the district court's power to make case-by-case decisions and "to exercise appropriate control over the discovery process." *Herbert v. Lando,* 441 U.S. 153, 177 (1979).

VI. Case-by-Case Balancing Is Preferable to Creation of a New Privilege

The government argues against case-by-case balancing. (Brief Amicus Curie of the United States at 26.) But as amicus NASW notes,[38] Congress established clear guidelines for case-by-case balancing in the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and

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37. That the threats should have remained confidential is argued in Note, *Did Congress Err in Failing to Set Forth Codified Rules Governing Privileged Relationships and Resulting Communications,* 72 U. Det. Mercy L. Rev. 181 (1994).

38. Brief Amicus Curiae NASW at 19.

Rehabilitation Act of 1974, Pub.L. 93-282, 88 Stat. 125. Section 333(b)(2)(c) of the Act provides that a court may compel the disclosure of otherwise confidential records on "good cause." The statute sets out a simple test, requiring the district judge to "weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services."

Congress adopted this explicit balancing test to replace the absolute bar on disclosure contained in the 1970 Act. Pub.L. 91-616, 84 Stat. 1848. Congress again employed this balancing test in the Veterans Omnibus Health Care Act of 1976, Pub.L. 94-581, 90 Stat. 2842, compiled as 38 U.S.C. §7332(b)(2)(D).

In this case, respondents did not seek to show that respondent Redmond would be harmed by disclosure of the statements she made to the counselor about the shooting. Indeed, it is difficult to conceive of any case where repeating the words spoken to describe a particular incident would be injurious to therapy. Disclosure of what respondent Redmond told the social worker about the shooting does not involve respondent Redmond's "feelings and interpretations." Brief of Amicus Curiae American Psychological Association at 20.

As in *Skipper v. South Carolina,* 476 U.S. 1, 9 (1986), the evidence from petitioner's family members "was the sort of evidence that a jury naturally would tend to discount as self-serving." Respondent Redmond's admission that her memory had "improved" during counseling was crucial to petitioner's challenge to Redmond's credibility and, as in *Skipper,* it is "implausible" to characterize the admissions as cumulative.

Case-by-case balancing is an evaluation that should be carried out in the first instance by the district court. As Professor Slovenko recognized when he retreated from his

advocacy of a therapy privilege, "privilege is, in the case of psychotherapy, an unnecessary and misleading claim." Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope,* 23 Cath. U. L. Rev. 649, 673 (1974).[39]

CONCLUSION

One dominant theme of the Federal Rules of Evidence is to uphold the admission of logically relevant evidence. It can fairly be said that Congress' message to the Court was: When in doubt, admit. The Court should decline to create a new privilege and instead rely on the good sense and sound discretion of district judges. The decision of the Court of Appeals should be reversed and the case remanded with instructions to reinstate the judgment of the district court.

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39. Amicus American Psychiatric Association suggests (at 16) that we have misstated Professor Slovenko's views by relying on his 1994 letter to the editor of the American Journal of Psychiatry. Our understanding of the change in Professor Slovenko's view from his 1960 article, Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L. Rev. 175 (1960), is derived from his above cited 1974 article.